FILE COPY

Office-Supreme Court, U.S.
FILED
APR 7 195
JAMES R. [illegible] Clerk

IN THE

Supreme Court of the United States

April Term, 1959

No. 819

THE P[illegible] OF THE STATE OF NEW YORK,
Respondent.

against

SAUL GREENBERG and GEORGE ORNSTEIN,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI

To the Court of Appeals, State of New York, and the Court of Special Sessions of the City of New York, County of New York, State of New York, Jointly or in the Alternative

I. BEN GREENMAN
Attorney for Petitioner
305 Broadway
New York 7, N. Y.
Of Counsel for Petitioners

THOMAS CARTELLI, Esq.
391 East 149th Street
Bronx 55, New York City, N. Y.
Attorney for Petitioners.

INDEX

	PAGE
Opinions	2
Jurisdictional Statement	2, 41
Constitutional Provision and Statutes Involved	3
Statement of Case	3
Relationship Between Global and the Federation Bank	9
Office Procedure, Books and Records of Global	10
Question Presented for Review	14
Argument	15
Point I—We respectfully submit that the petitioners were tried upon a criminal offense that was not contained in the information and the admission of evidence in support of such criminal charge was prejudicial to the defendants and constitutes reversible error and renders the information defective and subject to dismissal	15
Point II—There was no evidence to substantiate the commission of the crime of conspiracy and the conviction was based purely upon suspicion and conjecture	17

PAGE

POINT III—The failure of the District Attorney to produce all of the "work sheets" of the co-defendant Ornstein or explain their absence requires that the conviction be reversed 19

POINT IV—The petitioners were denied a fair trial in deprivation of rights guaranteed by the 14th Amendment (a) by the overzealousness of the prosecutor, and (b) by the actions of the Trial Court 25

(a) The overzealousness of the prosecutor 25

(b) The actions of the Trial Court 27

POINT V—The petitioner, Saul Greenberg, should not be held accountable and convicted of causing to issue a false financial statement when the record demonstrates that the alleged false financial statement in question was prepared entirely by the co-defendant, a certified public accountant, based upon facts and figures given to him by all officers of the corporation 29

CONCLUSION—The petition for a writ of certiorari as prayed for should be granted 32

Appendix A—Constitutional Statutes Involved 33

Appendix B—New York State Statutes Involved 34

Appendix C—Certificate Granting Petitioner Greenberg Leave to Appeal 35

Appendix D—Certificate Granting Leave to Appeal to Defendant Ornstein 36

PAGE

Appendix E—Order of Affirmance of Appellate Division, Supreme Court, County of New York re Greenberg 37

Appendix F—Order of Affirmance of Appellate Division, Supreme Court, County of New York, re Ornstein 39

Appendix G—Remittitur and Certificate of Court of Appeals 41

CASES CITED

Adams v. U. S., 317 U. S. 269, 281 25

Chicago-Burlington R.R. v. Chicago, 166 U. S. 226, 234-5 .....

DeJong v. Oregon, 299 U. S. 353, 362 17

Frank v. Mangin, 237 U. S. 309 25

Gitlow v. New York, 268 U. S. 652, 666 17

Hiertado v. California, 110 U. S. 516 25

International Shore Co. v. Levine, 68 F. 2d 517 (1934) 24

Jencks v. U. S., 353 U. S. 657, 77 S. Ct. 1007 (1957) 22

Lisemba v. California, 314 U. S. 219, 236 28

Moore v. Dempsey, 261 U. S. 86 25

Niemotko v. Maryland, 340 U. S. 268 19

PAGE

People v. Fielding, 158 N. Y. 542, 547 (1899) 25
People v. Grogan, 260 N. Y. 138, 143 16
People v. Savvides, 1 NY 2d 554 (1956) 25
People v. Strassner, 299 N. Y. 325, 328 16
People v. Tassiello, 300 N. Y. 425, 427 (1950) 25
People v. Tunstall, 5 App. Div. (2d) 338, 345 (1958) 25

Reno v. Bull, 226 N. Y. 546 31

Slochower v. Board of Higher Education of the City of New York, 350 U. S. 551; 76 S. Ct. 637 14
Soechtig v. Amuk, 140 N. Y. S. 2d 85 aff. 309 N. Y. 988 31
Stroble v. State of California, 343 U. S. 181 19
Stromberg v. California, 283 U. S. 359 17

Tunney v. Ohio, 273 U. S. 510 25

Ultramares Corp. v. Touche, 255 N. Y. 170 31
U. S. v. Andalshek, 142 Fed. 2d 503 (1944) 22
U. S. v. Coplon, 185 Fed. 2d 629 (1950) Cert. Den. 342 U. S. 920 (1952) 22

CONSTITUTIONAL PROVISION AND STATUTES, Etc.

14th Amendment Constitution of the U. S. Sec. 1 33

28 U. S. C. A. #1257 (3) 2

Section 1293 (b) of the Penal Law of the State of New York 34

IN THE

Supreme Court of the United States

April Term, 1959

No. .....

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

SAUL GREENBERG and GEORGE ORNSTEIN;
Petitioners.

PETITION FOR A WRIT OF CERTIORARI

To the Court of Appeals, State of New York, and the Court of Special Sessions of the City of New York, County of New York, State of New York, Jointly or in the Alternative

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to review the final decision of the Court of Appeals of the State of New York, dated January 8, 1959, affirming an Order of the Appellate Division of the Supreme Court, First Judicial Department of the State of New York,

which in turn affirmed a judgment of the Court of Special Sessions of the City of New York, County of New York, State of New York, entered the 21st day of December, 1955, convicting the Petitioners of causing the issuance of a false financial statement in violation of Section 1293(b) of the Penal Law of the State of New York and the crime of conspiracy, in violation of Section 580 of the Penal Law of the State of New York.

Leave to appeal to the Court of Appeals from the unanimous decision of the Appellate Division, First Judicial Department, was accorded by the Hon. Stanley H. Fuld, an Associate Justice of the Court of Appeals of the State of New York (see Appendices C and D).

The judgment of conviction of the Court of Special Sessions of the City of New York, County of New York, State of New York, is found on page 28 of the record on appeal.

Copies of the Orders of the Court of Appeals of the State of New York and the Appellate Division of the State of New York, First Department, are annexed as Appendices E and F.

Opinions

No opinion was rendered by either the Court of Appeals of the State of New York or the Appellate Division, First Judicial Department of the State of New York, or the Court of Special Sessions of the City of New York, County of New York, State of New York.

Jurisdiction

The jurisdiction of this Court is involved under 28 U. S. C. A. Section 1257(3).

Constitutional Provision and Statutes Involved

The constitutional provision involved is the 14th Amendment to the Constitution of the United States (see Appendix). The state statutes involved is Section 580 of the Penal Code of the State of New York and Section 1293(B) of the Penal Law of the State of New York (see Appendix A).

Statement of Case

The Grand Jury of the County of New York, State of New York, returned an information upon which the defendants were tried and convicted in the Court of Special Sessions of the City of New York, County of New York, and a judgment of conviction was entered on the 21st day of December, 1955 in the said Court of Special Sessions of the City of New York, County and State of New York, convicting the defendant Saul Greenberg of the crime of making a false financial statement with intent that it should be relied upon for the purpose of procuring a loan and credit and also the claim of conspiracy (R. 2810-2813).*

Upon conviction, one Judge dissented on the conspiracy count (R. 2508). Greenberg was sentenced to be committed to 60 days in the workhouse plus 6 months in the workhouse together with a fine of $500, by a majority of the Court with respect to the first count of the information and with respect to the third count of the information, Greenberg was to pay a fine of $500 or, in default thereof, 60 days in the workhouse plus 6 months in the workhouse, and the execution of the latter six months being suspended pending his good behavior. Ornstein also was fined and sentence suspended.

The fines were paid by petitioners and an appeal from the judgment of conviction of the Court of Special Sessions of the City of New York, County of New York, was there-

* All references in this brief are to folios of the record on appeal.

after taken to the Appellate Div., First Dept. of the State of New York, which unanimously affirmed the judgment of conviction. Thereafter, by leave of an Associate Justice of the Court of Appeals of the State of New York, to-wit, Justice Stanley H. Fuld, an appeal was further taken to the Court of Appeals which unanimously affirmed the order of the Appellate Div., First Dept., by a decree in the form of a remittitur dated January 8, 1959.

The information upon which the petitioners were tried consisted of three counts. (See pages 11-20 of Record on Appeal.)

Count I alleges a conspiracy in violation of Section 580 of the Penal Law between the defendants Greenberg and Ornstein and others unknown to the District Attorney, between the period from February 27, 1951 to July 15, 1951, to commit a crime in violation of Sect. 1293(b) of the Penal Law. In support thereof four overt acts are alleged as follows:

(1) A conversation on February 28, 1951, with Mr. Rosenberg at The Federation Bank and Trust Company (hereinafter called The Federation Bank);

(2) The delivery to Mr. Rosenberg on February 28, 1951 of a financial statement of Global Wrecking Corporation (hereinafter called Global), dated February 27, 1951;

(3) A conversation on May 24, 1951 with Mr. Rosenberg at The Federation Bank;

(4) The delivery to Mr. Rosenberg on May 24, 1951 of a financial statement of Global as of May 9, 1951 (32-35).

Count II alleges that on February 28, 1951 the defendants Greenberg and Ornstein made a false financial statement in writing with the intent that it should be relied upon for the purpose of making a loan and credit in violation of

Sec. 1293(b)-1 of the Penal Law by making a false financial statement of Global, as of January 15, 1951, to The Federation Bank (36-54).

Count III alleges that on May 24, 1951, the defendants, Greenberg and Ornstein made a false financial statement in writing with the intent that it should be relied upon for the purpose of the making of a loan and credit in violation of Sec. 1293(b)-1 of the Penal Law, by making a false financial statement of Global as at May 9, 1951, to The Federation Bank (55-70).

With respect to Count II the two defendants were acquitted (2509).

With respect to Count III, the information limits the alleged falsehood to the statements "Salvage Sales Accounts Receivable" represented to be $74,513, current liabilities represented to be $191,404.55, and the net worth represented to be $238,782 (56-57).

The information upon which the defendants were tried is based upon a series of unsecured loans (R. 232) made by The Federation Bank to Global Wrecking Co., a corporation engaged in the demolition of buildings and doing business in the City of New York.

It seems that from February 27, 1951 to August 14, 1951, the Global Wrecking Corp. was indebted to the Federation Bank in the sum of $154,000 (RP. Ex. 2, page 851). When it became apparent to the Bank that Global Wrecking Corporation would not be able to repay the amounts advanced and that civil remedies on individual guarantees, including an individual guarantee of the defendant Saul Greenberg, would be unsuccessful to repay the Bank's loans (stated to be approximately $100,000 (207)), a complaint was made to the District Attorney by the attorneys for the Federation Bank (227-230) and two days prior to the expiration of the statute of limitations on count 2, an information was voted by a Grand Jury of the County of New York, State of New York (22-29).

In 1951, the defendant Saul Greenberg was the President of Global Wrecking Corporation at the time that the acts were committed as stated in the information (1655). Other principals in Global Wrecking Corporation were Leo Gach, Secretary, and John DiBlasio, Treasurer.

No charges were preferred either against Leo Gach or John DiBlasio but both testified as witnesses for the People.

The co-defendant George Ornstein, a certified public accountant, had been practicing his profession in the City of New York for upwards of 22 years at the time of the alleged crime (2120-2121). He kept the books of Global Wrecking Corporation and, from time to time rendered additional services for which he received additional compensation as determined by the officers of Global Wrecking Corporation (2351).

During the latter part of February 1951, the defendants Greenberg and Ornstein approached Robert Rosenberg, a vice president and loan officer of The Federation Bank (107-108), in hopes of obtaining credit accommodations for Global from The Federation Bank (111, 114). After furnishing a financial statement as of January 15, 1951 on forms provided by the bank, a discussion with Mr. Rosenberg with respect to the items shown on said statement (117), and the execution of continuing personal guarantees by all of the officers of Global (Gach 706; DiBlasio 842-843; S. Greenberg 301), the requested credit accommodations were furnished on February 28, 1951 (127-128).

Thereafter bank accounts previously maintained by Global at The Merchants Bank of New York and the Hellenic Bank Trust Company were closed or allowed to become dormant (P. Ex. 11 and 12 respectively).

During the month of March 1951, it was brought to the attention of the defendant Greenberg, that the Socony Plant was to be sold for salvage and demolition. The original asking price for these rights was $750,000 (1590). The job was far greater in size and financial requirements than any other previously undertaken by Greenberg, individually, or

by Global. However, a competent appraisal fixed the then market value of the salvage as being in excess of $2,300,000 (D. Ex. D, 2767-2769), and all associated with Global in any manner whatsoever became anxious to acquire these rights with potential profits estimated to exceed $500,000 (917).

At the instigation of Abe Gach, an officer of M. Gach & Sons, Inc., a buyer of salvage from Global (881-882), and with an unknown amount of assistance from one Colonel Rosen, a finder who was not a licensed broker (914), an agreement was entered into whereby Global, in consideration of $435,000, payable $100,000 on execution of contract, and the balance in ten weekly installments of $33,500 each, acquired the right to demolish and salvage the Socony Plant (1590-1591).

The seller reserved the right to cancel the contract and return the deposit in the event Global failed to perform several conditions precedent, among them, a requirement to post a payment performance bond in the amount of $435,000 and a $435,000 bond for completion from an acceptable surety prior to May 17, 1951 (1599-1600).

Greenberg directed Ornstein to prepare a financial statement of Global for submission to a number of surety companies (1712). Thus the preparation of the May 9, 1951 statement which later became the gravamen of Count III.

This statement and a report on the value of prospective salvage made by Interborough Engineering Company were subsequently delivered to the Massachusetts Bonding Company, and after Peter Kornberg, Global's attorney, qualified as a trustee for receipts (2106-2107), the requisite performance bonds were obtained (1722). Final closing with respect to the Socony Plant took place on May 21, 1951 (2073).

Between March 20, 1951 and May 9, 1951 the defendant Greenberg, was attempting to obtain commitments from buyers of salvage and/or prospective Co-adventurers with respect to the Socony plant in order to ensure Global's

ability to make the requisite weekly installment payments. Among others he spoke with was Abe Gach, a buyer of salvage and the original finder (1596-1597).

The first weekly installment payment of $33,500 became due on May 24, 1951, and up to May 23, 1951 Abe Gach had not made any contribution to Global towards the purchase of the Socony plant. At a meeting attended by defendants Greenberg and Ornstein, Leo Gach, John DiBlasio and Martin Avroch, officers and employees of Global, Abe Gach and his brother-in-law, Charles Edelstein, and Peter Kornberg, the attorney for Global, $25,000 was demanded of Abe Gach (L. Gach 745; DiBlasio 823-837; Avroch 1470-1471; A. Gach 886-889, 960; Edelstein 995-998; Kornberg 2056-2065; Greenberg 1615-1619; Ornstein 2214-2215). The meeting lasted until after two o'clock in the morning and when it broke up Abe Gach promised to bring in $25,000 the following morning (835, 1483; 1529-1530).

On May 24, 1951 the money from Gach was not in hand and the defendants Greenberg and Ornstein, accompanied by Global's attorney, Peter Kornberg, visited Robert Rosenberg at The Federation Bank and informed him of the problem with respect to the first installment payment due on the Socony plant purchase (1637-1638, 1734).

Rosenberg indicated the bank would supply the necessary monies and during the course of the conversation asked whether Global had a more recent financial statement.

Ornstein produced a copy of the May 9, 1951 statement from papers in his possession at the time and Greenberg was asked by Rosenberg to sign the copy (1736-1737, 1791, 2099-2100). Shortly after Kornberg left the meeting, while Greenberg and Ornstein remained to explain and discuss the statement with Rosenberg in detail (2103).

Thereafter, between May 24 to July 30, 1951 the Federation Bank advanced $104,000 in new credit to Global (P. Ex. 2, page 851).

Relationship Between Global and the Federation Bank

The Federation Bank had an interest in Global some time prior to the beginning of discussions leading to the first loan in that a Dun & Bradstreet report had been requested on Global four days prior to the first conversations between Rosenberg and Ornstein and eight days prior to the meeting of February 28, 1951 (D. Ex. A, 2734).

Shortly after making the original loan to Global on February 28, 1951, the officers of The Federation Bank began to show an inordinate interest in the internal operations of Global. Rosenberg, the loan officer, began discussions with his friend Julian C. Ruben, a certified public accountant (1898), and suggested that he speak with the defendant Greenberg about becoming the accountant for Global (1901). Officers of the bank visited job sites and had daily conversations concerning the business of Global (1604-1605, 1630, 1725, 1761).

When the prospect of acquiring the Socony plant for the purpose of demolition and salvage materialized, the bank was so informed (1610-1611). When the contract to purchase the Socony plant was executed, a copy of the contract was furnished the bank as was a copy of the engineering report required by the bonding company (1610-1611, 1727-1728). Rosenberg, on behalf of the bank, requested Greenberg not to seek credit or investment money from any source other than the bank (1728, 1798).

When Global required the assistance of the bank to meet its contractual obligations with respect to the purchase of the Socony plant, the influence of the bank became supreme. Ruben, the accountant previously recommended by the bank, was hired by Global at an outrageously high retainer measured by Global's ability to pay (1931-1945) and the task of keeping Global's books was turned over to Allan A. Brown, Ruben's employee (355-356). Thereafter access

to and information concerning the financial records of Global were denied officers of Global (1873-1874, 1877, 1886). The bank "took over" (1808-1809). A default judgment was suffered to be entered against Global (2081), and on orders of the bank access to the corporation's financial reports were denied to the trustee for receipts appointed on behalf of the bonding company (2115-2118).

Shortly after the commencement of demolition and salvage operations there was a sharp break in the price structure of steel scrap with the consequent failure on the part of Global to realize the anticipated profits from the Socony job with the result that it was unable to repay the loans from The Federation Bank.

Office Procedure, Books and Records of Global

The defendant Greenberg and his co-officers of Global, Leo Gach and John DiBlasio, were all active participants in the business of Global. The defendant Greenberg's principal duty in Global was to get new business and to sell salvage from jobs in or about to be in process of demolition. Leo Gach and John DiBlasio were primarily supervisors of jobs in progress (1545-1547). Consequently the three were seldom in the office of Global during "normal" working hours.

A secretary was in charge of the office of Global during daylight hours where Ornstein, who had office space from Global as part of his compensation, kept the books and records of Global, based on information given to him by the officers and other employees (1644, 1657-1659, 2278-2282).

At least twice a week (1542) and more often daily, at the end of the working day, it was customary for the officers and supervisory employees of Global to come from the "field" to Global's office at which time they turned over to Ornstein memoranda of transactions in which they had participated (1644). Such transactions were thereafter re-

corded on work sheets kept by Ornstein, and footings were from time to time tabulated by other employees of Global (1557-1558).

Checkbooks of the several banks where Global had deposits and a Cash Receipts and Disbursements Journal were the only permanent books of account kept on a current basis. Records of all transactions not involving cash receipts or disbursements were kept by Ornstein on "worksheets" for later posting to the permanent books of account.

The maintenance of financial records in this manner was entirely consistent with accepted accounting practices with respect to firms engaged in the demolition business in New York City (A. Brown 489-493; Dolgin 1332-1333; Ornstein 2201-2205). Such practices grew out of the many variables involved in demolition and salvage, i.e., inventories based on estimates, the possibility of loss of inventory by fire, theft or other disaster, and the constantly fluctuating price structure for salvage materials.

Under such circumstances, such "worksheets" were as much a part of a demolition firm's "books and records" as were the checkbooks and the cash receipts and disbursements journal.

That the defendant Ornstein maintained such "worksheet" records is unquestionably established from the testimony. Alvin Brown conceded that he received worksheets from Ornstein in the presence of Julian Ruben, after Ruben was retained to take over as accountant for Global (358, 406, 473, 478, 481, 485-487, 521, 537). Leo Gach testified that, while the books of account were not up to date, Ornstein had the records on "papers" (689). Dolgin, a certified public accountant and an investigator on the District Attorney's staff (1120-1121) and the prosecutor knew of the claim that records had been kept on worksheets and that such worksheets had been turned over to Ruben (1167, 1334-1335). Dolgin further testified that there were "lots of records" other than those in evidence which he did not examine thoroughly (1233-1236); and that Ornstein's work-

sheets might be in the possession of Ruben (1237-1238). Avroch testified that he worked on worksheets (1555-1559). Greenberg's testimony refers to worksheets which he considered part of the corporation's books of account (1643-1645, 1818, 1821, 1833, 1846, 1892). Ruben confirmed the existence of worksheets and conceded that he received them from Ornstein (1967-1970). Ornstein testified at length not only as to the existence of such worksheets (2148, 2162, 2189-2190, 2198-2201, 2229, 2246-2247, 2302, 2396, 2433) but also that he turned over such records to Ruben and Brown when they succeeded him as accountants for Global (2148, 2163-2166, 2247).

It was apparent at the conclusion of the People's case that the financial statement of Global as of May 9, 1951 was alleged to be false in the following aspects:

1. Under the heading Salvage Sales Accounts Receivable, M. Gach & Sons, Inc. was shown as being indebted to Global in the amount of $38,500, whereas the People alleged that the true amount was approximately $4,000, a resulting overstatement of $34,500.

2. Under the heading Salvage Sales Accounts Receivable, M. Fine Lumber Co., Inc. was shown as being indebted to Global in the amount of $12,000, whereas the People alleged that the true amount was approximately $6,500, a resulting overstatement of $5,500.

3. Under the heading Salvage Sales Accounts Receivable, Advance Brick Co. was shown as being indebted to Global in the amount of $6,713, whereas the People alleged that Global owed Advance approximately $2600, a resulting overstatement of approximately $9,313.

4. Under the heading Salvage Sales Accounts Receivable, Consolidated Wrecking Company was shown as being indebted to Global in the amount of $11,800, whereas the

People alleged that no such obligation existed, a resulting overstatement of $11,800.

5. Under the heading Current Liabilities, the People alleged that the financial statement of Global as at May 9, 1951, failed to disclose that Global was indebted to Horn Construction Company in the amount of $950.

6. Under the heading Current Liabilities, the People alleged that the financial statement of Global as at May 9, 1951 failed to disclose that Global was indebted to Colonel Irving Rosen in the amount of $21,750.

7. Giving effect to the foregoing, the People alleged that the net worth of Global, shown on the financial statement as at May 9, 1951 in the amount of $238,782.55, was overstated to the extent of $85,813.

Question Presented for Review

We respectfully submit that as to the petitioners there is involved the following question:

> Did the petitioners receive a fair trial and does the verdict and judgment of the Court of Special Sessions as affirmed by the Court of Appeals of the State of New York, deprive the petitioner of his liberty and property without due process of law?

The essence of the due process clause is the protection of the individual from arbitrary action. *Slochower* v. *Board of Higher Education of the City of New York*, 350 U. S. 551.

In this case, the trial of the petitioners upon a charge not found in the information, the conduct of the District Attorney of the County of New York, and the subsequent conduct of the Court, all deprived the defendants of a fair and impartial trial and constitute the use of arbitrary action by public officials that warrant the intervention of this Court to protect "the rights of the petitioners under 'due process of law.'"

ARGUMENT

POINT I

We respectfully submit that the petitioners were tried upon a criminal offense that was not contained in the information and the admission of evidence in support of such criminal charge was prejudicial to the defendants and constitutes reversible error and renders the information defective and subject to dismissal.

The information in this case alleges the commission of a crime in violation of sub-section (1) of 1293(b) of the Penal Law. It alleges a violation of no other subdivision. This crime as defined by section 1293(b) sub-section (1) of the Penal Law of the State of New York charged the petitioners only with the crime of having knowingly made a false financial statement in writing with the intent that it should be relied upon for the purpose of securing a loan for the benefit of Global (see Appendix A).

At no time were the petitioners charged with having *procured* a loan on the basis of a financial statement which was supposed to be false, which act (i.e., procurement) would then constitute a separate and distinct crime, or crimes, under sub-section 2 and 3 of section 1293(b) of the Penal Law of the State of New York. Thus, the information strictly limited the crime charged as only defined in subsection (1) of section 1293(b) of the Penal Law of the State of New York.

However, at the very outset of the trial, over objection and exception taken (Record 130-138), the People were permitted to put into evidence Global's financial ledger which showed transactions of Global with the Federation Bank and which tended to indicate a more serious crime than the mere issuance of a false statement.

In addition, the People was also permitted to adduce testimony as to the defendants as to how much money was actually advanced to Global by the Federation Bank (128, 138-139, 189-190). Finally, and also at the onset of the trial, and over strenuous objection, the People were permitted to establish that at the time of the trial approximately $100,000 was due and owing from Global Wrecking Corporation to the Federation Bank (207).

The prejudice that resulted from the admission of such evidence at the onset of the trial became very evident and immeasurably injured the petitioner throughout the rest of the trial for the attitude of the Presiding Justice, as hereinafter outlined (see Point IV), became evident, apparent and very detrimental to the petitioner thereafter.

It is a fundamental principle of criminal law that a defendant must be tried on the information presented. If the information charges a defendant with one crime, he cannot be tried for or convicted of another. This principle is well defined by Judge Crane in *People* v. *Grogan*, 260 N. Y. 138-143 as follows:

> "We cannot try a defendant on a charge of committing an act constituting a crime and then prove him guilty of another act of which he has not been charged. This is a fundamental principle of criminal law."

Where a statute includes several offenses, it has been held by this Court that the information is defective and must be dismissed if it charges the commission of an offense under one subsection of the statute and the proof shows commission of an offense under another subsection thereof. *People* v. *Strassner*, 299 N. Y. 325, 328 (1949).

Thus, the admission of the evidence showing the amount due and owing, the amounts advanced and the ledger sheet of the Federation Bank and Trust Company constitutes serious error as the admission of such evidence tends to establish the commission of crime under section 1293(b) subsections 2 and 3 of the Penal Law of the State of New

York and thus, the conviction of the petitioner was obtained upon a charge that was not contained in the information and thus such a conviction is a denial of due process under the 14th Amendment of the Constitution of the United States *De Jong* v. *Oregon*, 299 U. S. 355-362; *Stromberg* v. *California*, 283 U. S. 359.

POINT II

There was no evidence to substantiate the commission of the crime of conspiracy and the conviction was based purely upon suspicion and conjecture.

Under the due process clause, criminal guilt is a purely personal matter. No one can be deprived of liberty for isolated acts by another unless there is proof beyond a reasonable doubt that he intentionally consorted with the doer in the doing thereof.

The liberties of an individual under the 14th Amendment cannot be struck down by any agency of the State, be it executive, legislative or judicial, except by due process. *De Jong* v. *Oregon*, 229 U. S. 353, 364; *Gitlow* v. *New York*, 268 U. S. 652, 666. In the case at bar, one of the Justices dissented from the conviction on Count I (conspiracy) (R. 2508). This is quite understandable since it is difficult to find anywhere in the record any evidence of a conspiracy. The information charges a conspiracy to violate section 1293(b) between February 27, 1951 and July 15, 1951. There is no evidence from a single witness of such a conspiracy.

It cannot be questioned but that proof of any conspiracy is lacking with respect to the financial statement of January 15 (Exhibit I) upon which the defendants were acquitted. It is submitted with respect to the petitioners that the record will negate the existence of any conspiracy, particularly when it was uncontradicted that the statement of May 9, 1951 was delivered to Rosenberg quite spontaneously when the visit was made to the bank on May 24, 1951, and that

on such date, for the first time, the petitioner Saul Greenberg signed the financial statement of May 9, as President.

This very act in itself, on the part of the petitioners should have destroyed any possibility of the petitioners being convicted of the crime of conspiracy. What makes it more interesting and astonishing is that the District Attorney of the County of New York, in a 29 page brief submitted to the Court of Appeals, and in seeking to justify the conviction of the petitioner on the conspiracy charge, used only 28 lines as its explanation in support of the conviction of the petitioner on this charge. The reasoning of the District Attorney of New York County with respect to the charge of conspiracy is so unusual as to confound one's sensibilities of fair play and true justice. The argument of the District Attorney in his brief is as follows:

> "The evidence treated above fully established the defendants' guilt not only of the substantive crime involving the May financial statement (Count 3), but also of a conspiracy to commit it (Count 1). The circumstances of this case show beyond cavil that the defendants were acting in an unlawful combination, and no other explanation of the proven facts is possible. Certainly, the accountant, Ornstein, would not deliberately prepare a false statement for the benefit of a small corporation unless directed to do so by Greenberg, the active president and indirect owner. Greenberg could not have signed and issued a false statement unless Ornstein, the accountant, had so prepared it at his request. Thus, in order to commit the crime, it was necessary for both defendants to have agreed to cooperate. Cooperation was especially necessary during the discussion of the items on the statement with Rosenberg (185, 1625, 2178-9). Moreover, the defendants substantially admitted in their testimony that the financial statements were prepared and issued by agreement (1656-7, 1773, 1857, 2137, 2224-5, 2256-7). For that reason, proof that the defendants unlawfully

made the false statement was also proof of a corrupt agreement to make it, which constituted the crime of conspiracy as charged (Penal Law, Sec. 580)."

The astonishing and arbitrary reasoning advanced by the District Attorney evidently was accepted by the Appellate Courts of the State of New York.

However, in enforcing the due process clause, this Court is not bound by the conclusions of the Court below but will re-examine the evidentary basis on which these conclusions are found. *Niemotko* v. *Maryland*, 340 U. S. 268.

Thus, the due process clause is operative even though the state agency may be the judicial department of the state. *Chicago Burlington R. R.* v. *Chicago*, 166 U. S. 226-234-5. A re-examination of the evidence adduced at the trial, we submit, will demonstrate the complete absence of proof to substantiate a conviction of conspiracy and, thus, the conviction of the petitioner was arbitrary and a violation of the liberties guaranteed by the due process clause of the 14th Amendment of the Constitution of the United States. *Stroble* v. *State of California*, 343 U. S. 181.

POINT III

The failure of the District Attorney to produce all of the "work sheets" of the co-defendant Ornstein or explain their absence requires that the conviction be reversed.

The entire defense necessarily depended upon the defense that was offered by the co-defendant George Ornstein, the certified public accountant hired by the Global Wrecking Corporation, and the person who prepared the May 9 statement (People's Exhibit 7). It was brought out at the trial that the defendant Ornstein had been doing work for demolition firms since 1929 and was familiar with the customs of such firms and the handling of their books

and records (Record 2201-2210). It was further brought out that in a demolition business, there is a constant state of flux because the work is subject to changes on short notice and the estimates of the amount of salvage available are very variable.

Salvage was sometimes sold under fixed fee contracts to companies who purchased all the material from a certain job and, in addition, there were day to day sales to persons who came and picked up the salvage at the job sites. As a result of this unstable flexible situation, the records were usually kept on daily worksheets and not entered in the permanent books of the company. It was in this manner that the books and records of Global Wrecking Company were kept; and, if a statement was drawn, as in the instant case, it was based upon the books, records *and worksheets*; said worksheets containing entries furnished by officers of the company supervising the jobs and upon all reports with respect to sales of salvage and inventory; all also furnished by officers of the company working on the jobs (R. 1632, 1643-1644, 1656-1657, 1698-1700, 2178-2181, 2198).

Throughout the course of the trial, the defendant Ornstein was handicapped by the fact that these accounting worksheets upon which were entered the reports from officers in connection with the salvage sales, etc., and which papers also included in his computations and figures in connection with the preparation of the May 9 statement, had been handed to Julius Ruben and never returned to him. Ornstein further testified that he made demands upon Ruben to return them but that Ruben ignored them; that he looked through the District Attorney's papers before the trial and that his worksheets were not there (2848-49, 2163-66, 2199-2201). The contradictory testimony of Ruben and its unbelievability was clearly apparent at the trial (R. 1967-1972).

What then happened to Ornstein's worksheets? This was the puzzling situation that prevailed at the trial. However, in attempting to establish an error or a false entry

in the statement of February 1951 (Exhibit I) the District Attorney offered in evidence six worksheets as People's Exhibit 13. These were supposed to pertain to the amount of $782.97 listed as advances receivables in Exhibit I, which the defendant Ornstein later successfully explained to the Court but annexed to Exhibit 13, which was thought to refer only to the February statement, to-wit, Exhibit I, there was discovered a worksheet dated May 9, 1951.

This one page (page 872 of the record on appeal), a worksheet dated May 9, 1951 is one of the worksheets out of the 13 pages which Ornstein contended throughout the trial he handed over to Ruben and which, according to the latter, came into the possession of the District Attorney.

The accidental production by the District Attorney of this one sheet of Ornstein's worksheets relating directly to the alleged false financial statement of May 9, 1951, to say the least, was most peculiar.

The existence of this page conclusively corroborated Ornstein's testimony that he gave his worksheets to Ruben and the statements made by Ornstein throughout the trial that if he had these worksheets, these worksheets would have completely exculpated him, should have been given credence and full belief by the Courts below (R. 2149, 2200-2201). It is respectfully submitted that the withholding of these worksheets prepared by the co-defendant Ornstein deprived the petitioner, a layman, who had no choice but to rely upon Ornstein's testimony and his worksheets to prove the innocence of the petitioner, of a fair trial. Wigmore on Evidence at Sec. 291, states the following rule:

> "The failure or refusal to produce a relevant document, or the destruction of it is evidence from which alone its contents may be inferred to be unfavorable to the possessor, provided the opponent, when the identity of the document is disputed, first introduces some evidence tending to show that the document actually destroyed or withheld is the one as to whose contents it is desired to draw an inference."

"There is no distinction in the present connection between spoliation and non-production."

In a criminal case, the withholding or non-production of evidence in the hands of the prosecution required by the defendant to establish his innocence voids a conviction. In *Jenks* v. *U. S.*, 353 U. S. 657, 77 S. Ct. 1007 (1957), the Supreme Court reversed the conviction of a defendant merely upon the ground that documents in the government's file were withheld from defendant's examination.

The Court's decision in *Jenks* followed two opinions by Judge Learned Hand to the same effect. *U. S.* v. *Andolshek*, 142 Fed. 2d, 503 (1944); *U. S.* v. *Coplon*, 185 Fed. 2d, 629 (1950) cert. den. 342 U. S. 920 (1952).

In the *Andolshek* case, Judge Hand stated:

"While we must accept it as lawful for a department of the Government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate and whose criminality they will, or may, tend to exculpate."

How much more true is this fundamental principle of law in a case like the case at bar, where the exculpator's documents were gratuitously and voluntarily given to those who later were instrumental in instituting the criminal proceeding against the petitioner.

Saul Levy, an attorney, certified public accountant and eminent writer in the field of legal responsibility of accountants and author of the work "Accountants Legal Responsibility" published by the American Institute of Accountants, states in an article, "Legal Hazards in Public Accounting," Journal of Accountancy, vol. 99, May, 1955, pp. 37-39:

"The accountant's working papers have always played a most important part in any litigation against accountants. Such working papers help the accountant in defending his work because they comprise a record of the work done, the basis for the accountant's opinion and evidence of his compliance with generally accepted auditing standards."

Mr. Levy states, in "Accountants Legal Responsibility", American Institute of Accountants, 1954, at p. 53:

"In any case brought against an accountant on the ground that negligence or fraud was involved in his work, it is altogether likely that the working papers relating to the audit will be offered in evidence in whole or in part."

The author states that the working papers may be relevant for the following purposes:

"1. The working papers will constitute a record of the audit work performed, both from a qualitative and quantitative standpoint. That is to say, they will constitute proof of what records were examined, what inquiries were made, what confirmations were undertaken, etc. At the same time, they may constitute a record of the amount of testing and sampling that was performed which, in the judgment of the accountant, was adequate in the circumstances."

In the instant case it is submitted that such working papers would have established that in hastily preparing this financial statement without an audit there were no confirmations nor any checking. Further relevant purposes are stated by the author as follows:

"4. The scope of his inquiries addressed to the client *and the extent to which the accountant relied*

upon the client's representations may be recorded in the working papers." (Emphasis added.)

"6. The working papers in their entirety may be offered by the accountant as evidence of his compliance with generally accepted auditing standards in support of the opinion expressed in his report."

"8. Where the genuineness of the accountant's belief in the opinion which he has expressed is put in issue, the working papers may offer persuasive evidence of the thinking of the accountant in the development and formulation of his opinion."

In an article, "Audit Working Papers and Legal Responsibility" by Saul Levy, Journal of Accountancy, vol. 101, May, 1956, pp. 36-39, it is stated:

"The working papers of an accountant will almost inevitably play a crucial role in any situation where audit work is attacked."

In *International Shoe Co.* v. *Levine*, 68 F. 2d, 517 (1934), the discharge of a bankrupt was opposed on the ground that he had failed to keep a full set of books and had filed a false financial statement. The objections to the discharge were overruled in spite of the fact that the books were not complete, since no intent to defraud or conceal was shown, and the court stated:

"Respecting the keeping of books, the requirement is in the alternative 'books or records'. There may be records which are not books."

In the cited case there were no general ledger accounts kept so that the statement could not have been made from the books alone, but other records were necessary. The court found that there was no requirement that everything be posted to permanent books to absolve the bankrupt from the charge of having issued a fraudulent statement.

Thus, the failure to produce all the worksheets which were in possession of the District Attorney at the trial and the failure to explain their absence, deprived the petitioners of a fair trial and violated the due process as guaranteed by the Constitution of the United States and their conviction should be set aside accordingly.

Tunney v. *Ohio*, 273 U. S. 510;
Moore v. *Dempsey*, 261 U. S. 86;
Frank v. *Mangin*, 237 U. S. 309;
Adams v. *U. S.*, 317 U. S. 269-281;
Hiertado v. *California*, 110 U. S. 510.

POINT IV

The petitioners were denied a fair trial in deprivation of rights guaranteed by the 14th Amendment (a) by the overzealousness of the prosecutor, and (b) by the actions of the Trial Court.

(a) The overzealousness of the prosecutor

The duties of a Public Prosecutor have often been the subject of judicial interpretation by the courts of this state. Early in our jurisprudence, Judge Vann, in *People* v. *Fielding*, 158 N. Y. 542, 547 (1899), defined a public prosecutor as a "quasi-judicial officer" and as such, one who is "presumed to act impartially in the interest only of justice." The rule of conduct, so defined, is still the law of this State:

People v. *Savvides*, 1 N. Y. (2d) 554 (1956), reversing 1 App. Div. (2d) 242 (1956), see: dissenting opinion in App. Div. (at p. 248, 249); *People* v. *Tassiello*, 300 N. Y. 425, 427 (1950); *People* v. *Tunstall*, 5 App. Div. (2d) 338, 345 (1958).

An examination of the record in its entirety, establishes that the prosecutor went too far afield in his efforts to ob-

tain a conviction. We specify without extensive comment, the following "irregularities" in the record before this Court:

1. The prosecutor's attempt to create the impression that all of Global's books and records were in evidence, whereas in fact a great number of records were deliberately withheld or the failure to produce them was not adequately explained, e.g.:

(a) Checkbooks for The Federation Bank accounts, even though requested by the defense (502, 506-517).

(b) Records of Peter Kornberg as Trustee for receipts of Global after May 15, 1951.

(c) Records of Klondike operations (1338-1342, 1657-1659, 1666-1671, 1866, 2240-2241).

(d) Ornstein's worksheets..

2. The prosecutor's instructions to Peoples' witnesses appearing for purpose of testifying as to records to be offered in evidence, to bring only part of their records with them, thus limiting the scope of cross examination:

(a) As to Abe Gach (925-929, 933, 939, 944-946).

(b) As to Meyer Fine (1070).

(c) As to William Brown (1114).

With respect to Brown, we note with emphasis that he did not produce his ledger sheet on St. Nicholas Street job which was alleged to be the biggest "Klondike" job (1818-1821).

3. The failure to call one disinterested certified public accountant to testify as to whether Ornstein's methods were in accordance with sound accounting procedures.

4. Improper attempts to "trap" defense witness Avroch by asking hypothetical questions where the prosecutor knew the hypothesis was false:

(a) As to Kornberg (1521-1524, 1536-1538, cf. 2068-2069, 2101).

(b) As to DiBlasio (1545, cf. 798, 801-805).

5. Improper use of Grand Jury minutes (1758-1761, 1794-1796, 1799, 1854-1857, 1860-1862, 2405-2408).

6. Obvious bias in testimony of Dolgin as evidenced by:

(a) His failure to examine all the records of Global and his insistence on confining his testimony to books and records of Global in evidence (N. B.). Dolgin conceded that the records in evidence were not all of the records of Global (1233-1236).

(b) Answers to hypothetical questions re:

i. Gach account (1292-1296);

ii. Fine account (1318);

iii. Consolidated Wrecking Account (1344).

We do not contend that each of the above mentioned irregularities by itself would constitute reversible error; however, when considered in toto, reversal is indicated on the ground that the petitioner did not receive a fair trial.

(b) The actions of the Trial Court

The conduct of a trial court in criminal cases has been the subject of many decisions, particularly in cases requiring jury verdicts. However, the rules of conduct applicable to a Court should not be restricted to Jury trials. A Court of Special Sessions in the County of New York, which acts as Judge and jury, should be particularly care-

ful to maintain its judicial decorum because the lack of decorum so unsettles and unnerves counsel that they are apt to lose their perspective of the case, with the result that they do not properly represent their clients. In the case at bar, the Court repeatedly conducted the trial by cross examination of the defendants' witnesses; repeatedly made disparaging remarks to the petitioner's counsel; repeatedly propounded leading questions; criticized the testimony of the accused and attempted to trap witnesses into contradictions. In the instant proceeding, the trial court below repeatedly departed from its role as an impartial judge and jury and injected itself into the proceedings in a most inordinate manner as can be seen from the record as follows:

> 833-837, 962-964, 992, 994-995, 999, 1038-1039, 1057-1064, 1129, 1231-1232, 1309-1311, 1352, 1420-1427, 1472-1473, 1475-1479, 1487-1489, 1494-1496, 1520-1521, 1533-1536, 1547, 1580-1582, 1608-1609, 1621-1624, 1633-1643, 1658-1659, 1698-1699, 1700, 1704-1706, 1839, 1846, 1857-1857, 1984-1987, 2012-2015, 2206-2210, 2233-2235, 2237-2244, 2249-2250, 2251-2253, 2262, 2271-2274, 2284, 2348, 2374-2376, 2394-2397, 2402, 2412, 2415-2416, 2442-2444.

The Supreme Court of the United States in *Lisenba* v. *California*, 314 U. S. 219, at page 236, held:

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice."

We submit that the record before this Court conclusively establishes that the Court below failed to accord the petitioner the minimum amount of fairness requisite to compliance with the constitutional requirement for "due process" and, for that reason, the conviction herein obtained should be reversed as against the petitioner.

It is respectfully submitted that the failure of the prosecution to produce the worksheets therefor not only re-

sulted in a failure of proof that the May 9, 1951 statement was not in accordance with the books, records and accounts of the corporation but since they were evidence which had come into the possession of the District Attorney, that the failure to produce such worksheets at the trial or to explain its absence, deprived the petitioner Saul Greenberg of a fair trial under the due process clause of the 14th Amendment of the Constitution of the United States.

POINT V

The petitioner Saul Greenberg should not be held accountable and convicted of causing to issue a false financial statement when the record demonstrates that the alleged false financial statement in question was prepared entirely by the co-defendant, a certified public accountant, based upon facts and figures given to him by all officers of the corporation.

The May 9, 1951 financial statement was prepared by George Ornstein, the co-defendant, in his capacity as a certified public accountant, in behalf of the Global Wrecking Corporation, of which the defendant, Saul Greenberg, was President (fol. 2167). It was qualifiedly certified only by the co-defendant on May 9, 1951 and later was signed by Saul Greenberg, as President of the Global Wrecking Corporation, in the office of Robert Rosenberg, the official of the bank creditor (fols. 2168-69) on May 24, 1951.

The items contained in this statement were obtained by George Ornstein not only from Saul Greenberg but also from two other officers of the corporation and from the records, etc., of the Global Wrecking Corporation (fols. 2179, 2198, 2279, 2444, 2423, 2400, 2224).

The method of keeping the books and records, and the handling of salvage sales accounts was strictly the responsibility of Ornstein, who explained his accounting

method based upon 26 years of experience of handling demolition business accounts (fols. 2201 to 2210).

The inventory phases and inventory sheets were handled, according to George Ornstein, mainly by Leo Gach and John DiBlasio and rarely by Saul Greenberg (fols. 2282-2283).

The relationship of George Ornstein with Saul Greenberg was no greater than with the other officers and this relationship was so characterized by the defendant, Ornstein, himself (fol. 2372).

It was further brought out that the handling of the salvage accounts receivable was solely the creation of George Ornstein, who had been carrying out such a method of handling the salvage sales accounts receivable for 26 years (fol. 2403).

Even the defendant, George Ornstein, in his testimony, admitted that what he did in the preparation of the financial statement of May 9, 1951, was his own act as an accountant (fols. 2440 to 2444).

Actually, there was an unfriendly feeling between Saul Greenberg and George Ornstein, which had resulted, previous to the May 9, 1951, statement, in the discharge of the said George Ornstein by the said defendant Saul Greenberg (fols. 2451 to 2452).

It is therefore quite evident from all of the above facts that Saul Greenberg, as President of the Global Wrecking Corporation, was unfairly singled out and was held jointly responsible with the co-defendant in connection with the preparation of the May 9, 1951, financial statement, when, in truth and in fact (if the May 9, 1951, financial statement is in any way improper or inaccurate) the responsibility for such inaccuracies should be solely that of the defendant, George Ornstein, particularly in view of the testimony which discloses that Saul Greenberg was not the dominant, or the sole officer, who handled all the details of the corporation but that the management, operation of the Global Wrecking Corporation in 1951, and up to May 9th of such

year, was carried on by three officers, including Saul Greenberg (fols. 2381, 2281-82).

It may, however, be possible, that, from a strict interpretation of accountancy principles, the financial statement is technically improper but, if this is so, the responsibility for the preparation of such a complicated financial statement is the responsibility of only the man hired to do such a job, and that is the certified public accountant George Ornstein.

For errors in judgment on the part of the accountant, no responsibility should attach to the defendant, Saul Greenberg. The co-defendant, George Ornstein, owed a duty to make the statement without fraud and with care and caution proper to his calling, and if there was a failure on the part of the co-defendant to do so it should not *ipso facto* involve Saul Greenberg, who happened to be President of the Global Wrecking Corporation at the time that the financial statement of May 9, 1951 was prepared. *Ultramares Corporation* v. *Touche*, 255 N. Y. 170; *Reno* v. *Bull*, 226 N. Y., 546.

In *Soechtig* v. *Amuk*, 140 N. Y. S. 2d 85 aff. 309 N. Y. 988, Court says as follows:

> "• • • in any event, the Courts are not Forums for determining what are and what are not correct accounting principles, except insofar as certain principles are mandated by statutes, or by accounting agencies."

The instrument of May 9, 1951, designated as a financial statement was prepared by the defendant George Ornstein, in accordance with his understanding of proper accounting principles. The District Attorney, through it's accountant, disagreed. However, the petitioner, Saul Greenberg, was held responsible and convicted in spite of the disagreement as to proper accounting items. In this respect, the Court exceeded its powers.

Conclusion

The petition for a writ of certiorari as prayed for should be granted.

Respectfully submitted,

I. Ben Greenman
of Counsel for Petitioners

Thomas Cartelli
Bronx, New York City
Attorney for Petitioners

APPENDIX A

Constitution of the United States

Amendment XIV—Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges of minorities of citizens of the United States nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

Section 1293(b)(1) of the Penal Law of the State of New York

Section 1293(b), obtaining property or credit by use of false statement.

> Any person (1) who shall knowingly make or cause to be made, either directly or indirectly, or through any agency whatsoever, any false statement in writing with intent that it shall be relied upon respecting the financial condition or means or ability to pay of himself or any other person, firm or corporation in whom he is interested, or for whom he is acting for the purpose of procuring in any form whatsoever either the delivery of personal property, the payment of cash, the making of a loan or credit, the execution, making or delivery by any person or corporation of any bond or undertaking, or the making, acceptance, discount, sale or endorsement of a bill of exchange, or promissory note, of the property of either himself or of such person, firm or corporation,
>
> Shall be guilty of a misdemeanor and punishable by imprisonment for not more than one year, or by a fine of not more than $1,000, or both fine and imprisonment.

The entire information containing the three counts can be found at page 11 of the record on appeal.

APPENDIX C

Certificate Granting Defendant Greenberg Leave to Appeal

STATE OF NEW YORK

COURT OF APPEALS

Before: Hon. STANLEY H. FULD, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

SAUL GREENBERG,
Defendant-Appellant.

I, STANLEY H. FULD, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to 520 of the Code of Criminal Procedure permission is hereby granted to the above named appellant to appeal to the Court of Appeals.

Dated at New York, New York, May 29, 1958.

(Signed) STANLEY H. FULD,
Associate Judge.

Notice: This certificate must be filed and an appeal taken within fifteen days from the date hereof. An appeal is taken by the filing with the Clerk with whom the judgment roll is filed of a written notice of appeal in duplicate (522, Code Crim. Pro.) and by service of a copy thereof upon opposing counsel (521, Code Crim. Pro.). The appeal must be argued within ninety days from date of the notice of appeal. (See 536, Code Crim. Pro.)

APPENDIX D

Certificate Granting Leave to Appeal to Defendant, Ornstein

STATE OF NEW YORK,

COURT OF APPEALS.

Before: HON. STANLEY H. FULD, *Associate Judge.*

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

—against—

GEORGE ORNSTEIN,
Defendant-Appellant.

I, STANLEY H. FULD, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to §520 of the Code of Criminal Procedure permission is hereby granted to the above named appellant to appeal to the Court of Appeals.

Dated at New York, New York,
May 29, 1958.

STANLEY H. FULD,
Associate Judge.

Notice: This certificate must be filed and an appeal taken within fifteen days from the date hereof. An appeal is taken by the filing with the clerk with whom the judgment roll is filed of a written notice of appeal in duplicate (§522, Code Crim. Pro.) and by service of a copy thereof upon opposing counsel (§521, Code Crim. Pro.). The appeal must be argued within ninety days from the date of the notice of appeal. (See §536, Code Crim. Pro.)

APPENDIX E

Order of Affirmance on Appeal from Judgment by Defendant Greenberg

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 22nd day of April, 1958.

Present: Hon. Martin M. Frank, Justice Presiding,
" Francis L. Valente,
" James B. M. McNally,
" Harold A. Stevens,
" Earle C. Bastow, Justices.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

vs.

SAUL GREENBERG and GEORGE ORNSTEIN,
Defendants-Appellants.

An appeal having been taken to this Court by the defendant-appellant Saul Greenberg, from the judgment of the Court of Special Sessions of the City of New York, New York County, rendered on the 21st day of December, 1955, convicting said defendant of the crime of conspiracy, pursuant to Section 580 of the Penal Code of the State

of New York, and the crime of issuing a false financial statement, pursuant to Section 1293b of the Penal Code, and said appeal having been argued by Mr. I. Ben Greenman, of counsel, for the appellant, and by Mr. William Rand, Jr., of counsel, for the respondent; and due deliberation having been had thereon.

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

Enter,

Vincent A. Massi,
Clerk

APPENDIX F

Order of Affirmance on Appeal From Judgment By Defendant, Ornstein

At a term of the Appellate Division of the Supreme Court held in and for the first Judicial Department in the County of New York, on the 22nd day of April, 1958.

Present: Hon. Martin M. Frank,
Justice Presiding.
" Francis L. Valente,
" James B. M. McNally,
" Harold A. Stevens,
" Earle C. Bastow,
Justices.

346

The People of the State of New York,
Respondent,

—vs.—

Saul Greenberg and George Ornstein,
Defendants-Appellants.

An appeal having been taken to this Court by the defendant-appellant George Ornstein, from the judgment of the Court of Special Sessions of the City of New York,

New York County, rendered on the 21st day of December, 1955, convicting said defendant of the crime of obtaining property or credit by the use of a false financial statement and of the crime of conspiracy, and said appeal having been argued by Mr. Aaron Benenson, of counsel, for the appellant, and by Mr. William Rand, Jr., of counsel, for the respondent; and due deliberation having been had thereon.

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

Enter,

VINCENT A. MASSI,
Clerk.

APPENDIX G

Remittitur of Court of Appeals

COURT OF APPEALS

State of New York, s.s.:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 8th day of January in the year of our Lord one thousand nine hundred and fifty nine, before the Judges of said Court.

Witness,

The Hon. ALBERT CONWAY,
Chief Judge, Presiding,

Raymond J. Cannon, Clerk

Remittitur: January 8th, 1959.

#306

THE PEOPLE, etc.,
Respondent,
against
SAUL GREENBERG and GEORGE ORNSTEIN

Be It Remembered, That on the 15th day of October, in the year of our Lord one thousand nine hundred and fifty-eight Saul Greenberg and George Ornstein, the appellants in this cause, came here into the Court of Appeals, by I. Ben Greeman and Seghers, Reinhart & McCall, their

respective attorneys, and filed in the said Court a Notice of Appeal and return thereto from the Judgments of the Appellate Division of the Supreme Court in and for the First Judicial Department.

And The People, etc., the respondent in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. I. Ben Greenman, of counsel for the appellant Greenberg and by Mr. Ambrose V. McCall, Jr., of counsel for the appellant Ornstein, Mr. William Rand, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgments of the Appellate Division of the Supreme Court appealed from herein be, and the same hereby are affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Court of Special Sessions of the City of New York, there to be proceeded upon according to law.

Therefore, It is considered that the said Judgments be affirmed as

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Court of Special Sessions of the City of New York before the Justices

thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Court of Special Sessions before the Justices thereof, etc.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office
Albany, January 8, 1959.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon, Clerk

Certificate of Court of Appeals

STATE OF NEW YORK
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the 12th day of March A. D. 1959.

Present: Hon ALBERT CONWAY, Chief Judge, presiding.

Mo. No. 109

THE PEOPLE &c.,
Respondent

vs.

SAUL GREENBERG and GEORGE ORNSTEIN,
Appellants.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant Greenberg and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted, return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Certificate of Court of Appeals

Upon the appeal herein there was presented and necessarily passed upon an alleged question under the Constitution of the United States, viz: Appellant Greenberg contended that in violation of his constitutional rights he did not receive a fair trial as guaranteed by the Fifth and Fourteenth Amendments. The Court of Appeals held that there was no such violation and that there was no substance or merit to appellant's contentions.

And the Court of Special Sessions of the City of New York is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

Gearon Kimball
Deputy Clerk

(Seal)